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In the Supreme Court of the United States

OCTOBER TERM, 1984

KENNETH E. HOLLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals affirmed on a theory of Hobbs Act jurisdiction that differed from the theory presented to the jury.

2. Whether interstate commerce was adversely affected by petitioner's extortion of a portion of the fee paid by the Commonwealth of Kentucky to a Florida doctor for services rendered.

3. Whether petitioner's Hobbs Act conviction should be vacated because the evidence proving three Travel Act violations also supported the Hobbs Act charge.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 29-36) is reported at 725 F.2d 377.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1984. A petition for rehearing was denied on March 2, 1984 (Pet. App. 37). The petition for a writ of certiorari was filed on May 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted on one count of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951, and on three counts of interstate travel or use of an interstate facility to perform extortion, in

violation of the Travel Act, 18 U.S.C. 1952. He was sentenced to concurrent terms of three years' imprisonment on each count. The court of appeals affirmed (Pet. App. 29-36).

1. As petitioner agrees (Pet. 4-5), the evidence at trial is accurately summarized in the court of appeals' opinion (Pet. App. 30-31). It shows that in his capacity as General Counsel for the Kentucky Department of Labor, petitioner hired Dr. Travis Pugh, a medical doctor practicing in Fort Myers, Florida, to read chest x-rays in black lung cases. Initially, Dr. Pugh established a center in Kentucky from which he worked. When he discovered that the caseload was too small to sustain the office, however, Dr. Pugh returned to his Florida practice. From there, he continued to read and submit reports on x-rays sent to him through the mail. He also traveled occasionally to Kentucky to give depositions concerning the x-rays. Dr. Pugh billed the Department of Labor for his services.

Petitioner ordered the fiscal unit of the Department to send Dr. Pugh's paychecks directly to petitioner. Pugh's final paycheck, in the amount of $5,000, was issued in March 1977 by the fiscal unit. Petitioner held the check until the following October. In the latter part of October, petitioner twice telephoned Dr. Pugh.[1] Petitioner threatened that he would not give Pugh the check unless the doctor divided the amount with him. Pugh needed the money and finally agreed to give petitioner $2,100 of the proceeds. On October 28, 1977, petitioner flew from Kentucky to Florida with the check, and Pugh met petitioner at the airport.[2] They drove to the doctor's bank. While

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[1]These two calls formed the basis of two of petitioner's Travel Act convictions.

[2]Petitioner's trip to Florida on October 28, 1977, formed the basis of the third Travel Act count.

petitioner waited outside, Dr. Pugh deposited the $5,000 check and withdrew $2,100 in cash. He immediately gave the cash to petitioner and took petitioner back to the airport for his return flight to Kentucky.

2. Prior to trial, in a bill of particulars, the government informed defense counsel how it intended to show that the charged extortion affected interstate commerce for the purpose of proving the jurisdictional element of the Hobbs Act count (Pet. App. 39):

> Dr. Travis Pugh, III was at the time of the alleged extortion a medical doctor who was engaged in interstate commerce in the extent that he had earlier contracted with the State of Kentucky for the delivery of certain professional services under the State's Black Lung Program. Dr. Pugh resided and maintained a practice in Ft. Myers, Florida.

The government elaborated on this theory in response to petitioner's motion for a judgment of acquittal at the close of the government's case-in-chief (1/5/83 Tr. 498-499):

> [The $5,000] check was written perhaps in March of 1977, and it did not get to [Dr. Pugh] until October. During that time, according to the testimony in this case, Dr. Pugh was traveling to and from Florida up to Kentucky, and the check was in fact brought in interstate commerce, and we submit, Your Honor, that the interstate commerce was affected.

Thereafter, the district court denied petitioner's motion for judgment of acquittal (*id.* at 503). Before submitting the case to the jury, the district court instructed that the Hobbs Act requires proof that "interstate commerce was delayed, interrupted or adversely affected" (1/7/83 Tr. 64). The court further charged (*id.* at 65) (emphasis added):

> Proof beyond a reasonable doubt that interstate commerce was affected even to a minimal degree is sufficient. Interstate commerce may be adversely affected within the meaning of the instructions by an increase in the cost of doing business in interstate commerce *or by a reduction of the profits from interstate business.*

Petitioner did not object to this instruction (see *id.* at 65, 76). Subsequently, the jury found petitioner guilty on the Hobbs Act count as well as the three Travel Act counts.

3. The court of appeals affirmed (Pet. App. 29-36). With respect to petitioner's Hobbs Act conviction, it ruled that the evidence was sufficient to prove that interstate commerce had been affected by the extortion (*id.* at 33-34) (footnote omitted):

> Such a direct effect on commerce is evident in the present case. The payments made by the Kentucky Department of Labor to Pugh for his services constituted interstate commerce. Payment for the services was an essential part of the interstate transaction. But for the extortion, Pugh would have been paid $5000 for the final group of depositions. Because of the extortion, Pugh only received $2100. [Petitioner's] extortion therefore directly affected the amount of payment that moved in interstate commerce.

The court rejected petitioner's argument that commerce was not affected because Dr. Pugh was no longer providing services to the Kentucky Department of Labor at the time that petitioner extorted from Pugh a portion of his final paycheck. The court first noted that the interstate transaction and the extortion need not be simultaneous (*id.* at 34). Nevertheless, the court held that here, "the victim *was* engaged in an interstate transaction at the moment of the extortion, albeit in the payment end rather than the delivery end of the transaction" (*ibid.*) (emphasis in original). And

after reviewing the legislative history of the Hobbs Act, the court below remarked that the effect on commerce may precede the extortion (*id.* at 35):

> For instance, [petitioner's] agreement to pay Pugh for reading x-rays in Florida was an act affecting commerce, and [petitioner's] subsequent extortion could be said to be in connection with that act.

In any event, the court concluded that "the language of the current statute is broad enough to include effects on commerce contemporaneous with an extortion" and that the evidence was sufficient to satisfy the commerce element of the Hobbs Act here (*id.* at 35-36).

ARGUMENT

1. Petitioner asserts (Pet. 8-16) that the court of appeals affirmed his conviction on a theory of Hobbs Act jurisdiction that was not presented to the jury.[3] See *Dunn* v. *United States*, 442 U.S. 100 (1979). We do not disagree with petitioner's statement of legal principles on this point. However, his argument is based on an inaccurate portrayal of the government's theory of the case and the opinion of the court of appeals. Petitioner raises no significant legal question that would warrant this Court's review; at most, he raises the fact-specific question whether the basis for the court of appeals' affirmance of Hobbs Act jurisdiction was consistent with the theory put to the jury. As to that question, we see no inconsistency whatsoever.

As the record shows, the government maintained from the outset that the services performed by Dr. Pugh for the Kentucky Department of Labor constituted interstate commerce. As the prosecutor argued, the services rendered

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[3]The Hobbs Act, 18 U.S.C. 1951, imposes criminal sanctions on any person who "in any way or degree obstructs, delays, or affects commerce * * * by robbery or extortion * * *."

by Pugh were in interstate commerce, and his $5,000 paycheck "was in fact brought in interstate commerce" (1/5/83 Tr. 498-499). In the same vein, the district court charged the jury that Hobbs Act jurisdiction was established if the extortion caused "a reduction of the profits from interstate business" (1/7/83 Tr. 65). On this precise theory, the court of appeals affirmed (Pet. App. 33-34):

> But for the extortion, Pugh would have been paid $5000 for the final group of depositions. Because of the extortion, Pugh only received $2100. [Petitioner's] extortion therefore directly affected the amount of payment that moved in interstate commerce.

Because there was no discrepancy between the theory presented to the jury and the theory on which petitioner's conviction was affirmed, there is no reason to discuss the many cases cited by petitioner requiring an identity of theories.

Petitioner suggests (Pet. 20-21) that certiorari should be granted here to establish guidelines that would require the government "to articulate the reasons it contends commerce is affected" and to require that the trial court rule on the sufficiency of the evidence before submitting the case to the jury. But that is exactly what occurred in this case. Petitioner moved for a judgment of acquittal on the basis that the interstate commerce element of a Hobbs Act violation had not been proved. The government responded by arguing that both the services rendered by Pugh and the payments received from the Kentucky Department of Labor constituted interstate commerce that was adversely affected by petitioner's extortionate demand (see 1/5/83 Tr. 498-499). Following the government's presentation, the district court ruled that enough evidence supported the government's theory to submit the case to the jury.

2. Petitioner further contends (Pet. 22) that by upholding his Hobbs Act conviction the court of appeals has extended the Hobbs Act to embrace all extortion, because "there is always a likelihood that the extortionate payment will end up in interstate commerce." Petitioner misses the point. Hobbs Act jurisdiction in this case does not depend solely on the fact that the extortionate payment eventually crossed state lines; the entire transaction was interstate. As the court below explained (Pet. App. 32), Dr. Pugh read x-rays at his home in Florida for the Kentucky Department of Labor; he mailed his reports to Kentucky. He also traveled to Kentucky for depositions. In addition to these interstate services, Pugh's paychecks were transmitted from Kentucky to Florida. Thus, the commerce in this case was the performance of services in exchange for fees. And as the court below concluded (Pet. App. 33-34), that commerce was adversely affected by the extortion because it decreased the payment received by Dr. Pugh for his services. The effect on commerce was direct and substantial. There is no reason to speculate that the opinion of the court of appeals might cause an unwarranted extension of the Hobbs Act in some future case.[4] Should petitioner's prediction prove accurate, review by this Court is available at that time.

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[4]We note that the Hobbs Act extends even to those cases in which the effect on commerce is de minimis. See *United States* v. *Jarabek*, 726 F.2d 889, 900-901 (1st Cir. 1984); *United States* v. *Boston*, 718 F.2d 1511, 1516-1517 (10th Cir. 1983), cert. denied, No. 83-1701 (May 14, 1984); *United States* v. *Boulahanis*, 677 F.2d 586, 589-590 (7th Cir.), cert. denied, 459 U.S. 1016 (1982); *United States* v. *Calder*, 641 F.2d 76, 78 (2d Cir.), cert. denied, 451 U.S. 912 (1981); *United States* v. *Chiantese*, 582 F.2d 974, 980-981 (5th Cir. 1978), cert. denied, 441 U.S. 922 (1979). The Hobbs Act prohibits extortion that interferes with commerce "in any way or degree." 18 U.S.C. 1951(a); *Stirone* v. *United States*, 361 U.S. 212, 215 (1960). Congress intended the Act to reach as broadly as the Commerce Clause permits (*United States* v. *Culbert*, 435 U.S. 371, 373 (1978); *Stirone* v. *United States*, *supra*). Consequently, the evidence here surpassed by far that needed to prove Hobbs Act jurisdiction.

3. Finally, petitioner claims (Pet. 25-26) that his Hobbs Act conviction should be reversed because the same acts that formed the basis of his Travel Act (18 U.S.C. 1952) convictions (two telephone calls to Pugh and petitioner's trip to Florida with the $5,000 check) also established the interstate commerce element of the Hobbs Act charge. We do not understand the gravamen of petitioners contention. Since the Hobbs Act can be violated in the absence of any conduct that would also violate the Travel Act, there is no reason why there could be no prosecution under both statutes where the facts of the case warrant it. Petitioner supplies no reason for this Court to address this undefined issue, which the court below chose to avoid (see Pet. App. 36 n.7).

In any event, Hobbs Act jurisdiction in this case did not rest solely on the acts of petitioner that also violated the Travel Act. Rather, it rested on Dr. Pugh's interstate business. As explained above, the flow of services and payments across state lines in this case constituted commerce. It did not matter for purposes of establishing jurisdiction whether Pugh received his check in the mail or whether petitioner brought it to him. In either case, Pugh's business was affected by petitioner's extortionate demand because he netted less for his services than he was entitled to.

In sum, none of petitioner's challenges to his Hobbs Act conviction warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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